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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia, entered on November 29, 1939, denying the Commission's motion to dismiss an appeal taken by respondent from an order of the Commission.

OPINION BELOW

The opinion of the court below (R. 30) is reported in 108 F. (2d) 737.

JURISDICTION

The decision of the court of appeals was entered on November 29, 1939 (R. 30). A motion for re-

argument filed by the Commission was denied on January 2, 1940 (R. 48). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 402 (b) of the Communications Act authorizes an appeal to the Court of Appeals for the District of Columbia from a decision of the Federal Communications Commission refusing its consent to a voluntary transfer of a radio station license.

STATUTE INVOLVED

The pertinent provisions of the Communications Act and of the Radio Act of 1927 are set out in the Appendix.

STATEMENT

The Associated Broadcasters, Inc. (hereafter called Associated), is a corporation licensed to operate Radio Station KSFO in the City of San Francisco (R. 7). Associated and Columbia Broadcasting System of California, Inc. (hereafter called Columbia), the respondent in this case,[1] requested the Commission to give its consent in writing to the assignment of Associated's radio station license to Columbia (R. 7). A hearing was held before an examiner, who recommended

[1] Respondent was known as Western Broadcasting Company when these proceedings were commenced before the Commission (R. 7).

that the requested consent be denied (R. 8). Exceptions to the examiner's report were filed, and oral argument was had before the Broadcast Division, and, subsequently, before the Commission *en banc* (R. 8). On October 18, 1938, the Commission rendered its decision and order denying the request for consent (R. 7–15).

Respondent and Associated thereupon filed separate notices of appeal in the court below, alleging that the determination of the Commission was erroneous (R. 1–6). The Commission filed motions to dismiss the appeals on the ground that under Section 402 (b) of the Communications Act the court below was without jurisdiction to entertain an appeal from the Commission's denial of a request for consent to the assignment of a radio-station license (R. 17, 19).

On November 29, 1939, the court below, comprised of Chief Justice Groner and Justice Miller, with Justice Stephens dissenting, rendered a decision denying the Commission's motion to dismiss in both cases (R. 30–34).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In holding that it has jurisdiction under Section 402 (b) of the Communications Act to review an order of the Commission denying a request for written consent to the assignment of a radio-station license.

(2) In failing to dismiss the appeal.

REASONS FOR GRANTING THE WRIT

1. The decision below determines important public questions under the Federal Communications Act and imposes a substantial burden upon the Communications Commission in administering that Act. Section 402 (a) provides for review under the Urgent Deficiencies Act—that is, by a three-judge district court—of orders of the Commission with certain specific exceptions. Section 402 (b) of the Act authorizes appeal to the court below from any decision of the Commission refusing an application "for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license," which are the classes of orders excepted from the provisions of Section 402 (a). The court below held that a decision of the Commission refusing its consent to a transfer of a radio station license comes within the class of orders reviewable before it.

We wish to point out at the outset that this decision is important not only because it determines the division of jurisdiction between the court below and three-judge district courts—a division which Congress was particularly careful to define—but also because it holds that a proposed transferee requesting consent to a transfer of a radio station license is to be considered an applicant to the Commission for a license, not only as concerns review in the court below, but also as

regards his right to a hearing before the Commission, the nature of his substantive rights, and the scope of review of an adverse determination of the Commission.

Section 308 provides that an application for a station license or for renewal or modification of a license shall be in writing and under oath or affirmation, and sets forth certain information which such an application must contain, or which the Commission may require that it contain. Section 309 (a) provides that if upon examination of any application for a license, or for a renewal or modification, the Commission shall determine that public interest, convenience, or necessity would be served by the granting of the application, it shall thereupon grant it, but that if the Commission does not so determine it shall afford the applicant an opportunity to be heard. Section 309 (b) provides that the Commission shall prescribe the form of station licenses, and enumerates certain conditions which the licenses must contain.

In contrast with the detail with which the statute prescribes the procedure which is to govern applications for station licenses, Section 310 (b) simply provides that a station license "shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall

give its consent in writing." Despite the fact that this section contains no provision requiring the filing of an application or that the Commission hold a hearing before denying a request for consent to a transfer of a license or a change of control of the licensee, the court below held that the statute contemplates the filing of an application and the holding of a hearing just as much in the case of an application for a transfer of an outstanding license as in the case of an application for a proposed new station license, and that an applicant for consent to a transfer therefore stands in the position of an applicant for a license as regards review under Section 402 (b).[2]

It is the Commission's contention that the statute prescribes an entirely different form of procedure to govern applications for station licenses from that which it prescribes for requests for consent to assignments of licenses and that proposed transferees under Section 310 (b) do not

[2] The court below went on to say that Associated, the proposed transferor, is "a person who, under the provisions of Section 402 (b) (2), may invoke the jurisdiction of this court to determine whether it has been aggrieved, or its interests adversely affected, by the decision of the Commission, refusing the application of Columbia" (R. 32). The correctness of this conclusion as to the standing of Associated to appeal is not presented in this case, but is presented, along with the questions which are involved here, in *Federal Communications Commission* v. *The Associated Broadcasters, Inc.*, No. —, this Term, the petition in which is filed herewith.

have a right to a hearing before the Commission on the issue of public interest, such as Section 309 (a) confers upon applicants for a license or for a renewal or modification of a license. Although the Commission does sometimes, as it did here, hold a hearing of its own volition, it does so because under some circumstances a hearing may be the most expeditious manner of "securing full information" and not because the Act requires it to hold a hearing in every case before refusing consent to a transfer. The holding of the court below to the contrary will place a serious administrative burden on the Commission. In 1938 there were 76 requests for consent to assignment of licenses and 46 requests for consent to transfer of control of a licensee, a total of 122, and in 1939 there were 77 requests for consent to assignment of licenses and 32 requests for consent to transfer of control of a licensee, a total of 109.[3] The decision below will thus require the Commission to hold more than 100 hearings annually in addition to those which it now holds—a substantial administrative burden.

The distinction which the Act draws in giving the right to notice and an opportunity to be heard to applicants for a license and not to persons requesting consent to a transfer of a license reflects

[3] Transfer of a license and transfer of control of a licensee are treated together in Section 310 (b), and the decision below is presumably equally applicable to both.

in part a practical difference between the effect upon the public of a denial in each type of case. If a request for consent to assignment is refused, the net result from the standpoint of the public is that the assignor will continue to operate the station rather than the proposed assignee, but no interruption in radio broadcast service will result from such refusal. If, on the other hand, an application for a station license is denied, the public is deprived of the proposed radio service.

2. The decision below disregards both the literal meaning and the general scheme of the Act, and is contrary to the construction indicated by its legislative history.

Sections 308 and 309 of the Act deal in detail with station licenses and with renewals or modifications thereof, and Section 319 deals similarly with construction permits, while Section 310 (b) contains a short general provision as to transfer of licenses or transfer of control of a licensee. Section 402 preserves these distinctions. It provides for review in the court below of a decision of the Commission refusing an application "for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license". These are the terms used in Sections 308, 309, and 319, and undoubtedly Congress used these terms with precisely the same meaning in Section 402. The conclusion is plain,

that a decision of the Commission withholding consent to a transfer of a license or of control of a licensee, dealt with in Section 310, is not, and was not intended by Congress to be, covered by Section 402.

This conclusion is supported by the legislative history. The report of the Senate Committee on Interstate Commerce on S. 3285, 73d Cong., 2d Sess., which became the Communications Act, states that Section 310 is adopted from Section 12 of the Radio Act of 1927 "as modified by H. R. 7716."[4] The conference report on the bill likewise so states.[5] H. R. 7716, to which the Committee reports thus refer, was passed by both houses at the 2d Sess., 72d Cong., but suffered a pocket veto. The Radio Act of 1927 provided, in Section 12, that no license should be transferred "unless the commission shall give its consent in writing." H. R. 7716, both as introduced and as adopted by both houses, amended Section 12 by adding, following "shall", the words "after a hearing, decide that said transfer is in the public interest, and shall."[6] Further, H. R. 7716 amended Section 16 of the Radio Act by providing for appeal to the court below from any order granting or denying

[4] Senate Report No. 781, 73d Cong., 2d Sess., p. 7.

[5] House Report No. 1918, 73d Cong., 2d Sess., p. 49. This report adds: "The present law is also modified to require the Commission to secure full information before reaching decision on such transfers."

[6] See Senate Report No. 1004, 72d Cong., 2d Sess., p 5; House Report No. 2106, 72d Cong., 2d Sess., p. 2.

an application "for approval of transfer or acquisition under this Act.[7] These provisions of H. R. 7716 would have given an appeal to the court below to a person requesting consent to a transfer, and, it may be, would have accorded him the status as respects right to a hearing which the court below held he has under Section 310 (b). But these provisions were omitted—and the omission is striking—from S. 3285, which became the Communications Act. The only reasonable conclusion from these omissions is that it was deliberately decided not to adopt the very policies which the court below read into the Act.

3. The construction given the Communications Act in the present case by the court below is contrary to the construction adopted by that court in *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, certiorari denied, 290 U. S. 680, which was tacitly approved by Congress by its subsequent reenactment of the statutory provision in question without substantial change.

In the *Pote* case the court below held that an appeal would not lie to it under Section 16 of the Radio Act of 1927 from an order refusing consent to an assignment of a license. Shortly after the decision in the *Pote* case, Congress, as related above, reenacted Section 16 as Section 402 (b) of the Communications Act of 1934. The court below held, however, that the presumption of congressional

[7] See Senate Report No. 1004, 72d Cong., 2d Sess., p. 5.

approval of the construction of the Act was not applicable because "one decision construing an act does not approach the dignity of a well-settled interpretation" (R. 32). But as the dissenting opinion of Justice Stephens points out (R. 33–34), the court below was the only court which could pass upon the particular question presented in the *Pote* case, and its decision was therefore, and especially in view of the denial of certiorari, a proper basis for holding that the question was finally settled by that decision. The presumption of congressional approval of the *Pote* case is strengthened by the fact that Congress, at the time it reenacted Section 16 of the Radio Act as Section 402 (b) of the Communications Act, had before it, in the current annual report of the Radio Commission, a discussion of the *Pote* case, summarizing not only the majority opinion but also the minority view of Mr. Justice Groner that a request for a consent to an assignment of license was in substance and effect an application for a radio station license.

As a reason for not following the *Pote* case, and as an additional reason for holding that there was no congressional approval of the construction given the Act in that case, the court below pointed out that Section 12 of the Radio Act was amended in its transition to Section 310 (b) of the Communications Act by the addition of the words "unless the Commission shall, after securing full information, decide that said transfer is in the public inter-

est". This addition, the court below said, makes it clear that an applicant for consent to a transfer shall have a hearing and a decision upon the basis of public interest just like an applicant for a license, and, accordingly, that an applicant for consent to a transfer is an applicant for a license who may appeal to the court below under Section 402 (b).

As pointed out in the dissenting opinion, the words added to Section 310 (b) of the Communications Act are more reasonably viewed as merely "definitive of the duty of the Commission when passing upon applications for transfers", and not as broadening the jurisdiction of the court below under Section 402 (b), which was not altered from Section 16 of the Radio Act in any way here material. This conclusion is irresistible in view of the deliberate omission from the bill, shown by the legislative history discussed above, of provisions for a hearing before the Commission and for review in the court below. The importance of the construction given by the court below to the newly added words, and the substantial burden its construction places upon the Commission, has been pointed out.

4. The *Pote* case was decided by a court composed of Chief Justice Martin and Associate Justices Robb, Van Orsdel, Hitz, and Groner. Justice Groner dissented from the majority decision in that case. In the present decision of the court below by Chief Justice Groner and Associate Justice Miller, the previous minority opinion of

that court has become the majority opinion, with Justice Stephens dissenting. Three members of the court below, namely, Associate Justices Edgerton, Vinson,[5] and Rutledge, have not directly passed upon the question raised by this case. In this situation it is impossible to know with any degree of certainty whether an appeal to the court below will lie from an action of the Commission in such cases, since a determination of that question will depend upon the views of the two Associate Justices who are assigned to sit with the Chief Justice in the case.[6] *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 181.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

FRANCIS BIDDLE,
Solicitor General.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.

APRIL 1940.

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[5] Associate Justice Vinson concurred in an opinion by Chief Justice Groner in *Crosley Corporation* v. *Federal Communications Commission*, in which the *Pote* case is cited with approval, 106 F. (2d) 833.

[6] The Commission requested a reargument before the entire membership of the court below in order to clarify this uncertainty (R. 5), but the request was denied without explanation (R. 48).

APPENDIX

The Communications Act (June 19, 1934, c. 652, 48 Stat. 1064, 47 U. S. C., § 151 *et seq.*) provides:

> SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.
>
> (b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to oper-

ate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States", approved May 24, 1921. [47 U. S. C., Sec. 308.]

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding.

In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof. [47 U. S. C., Sec. 309.]

SEC. 310. * * *

* * * * *

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and

shall give its consent in writing. [47 U. S. C., Sec. 310.]

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under

the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. [47 U. S. C., Sec. 319.]

* * * * *

PROCEEDINGS TO ENFORCE OR SET ASIDE THE COMMISSION'S ORDERS—APPEAL IN CERTAIN CASES

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for

a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application. [47 U. S. C., Sec. 402.]

The Radio Act of 1927 (February 23, 1927, c. 169, 44 Stat. 1162, as amended July 1, 1930, c. 788, 46 Stat. 844) provides:

SEC. 12. * * *

The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.

* * * * *

SEC. 16. (a) An Appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Ap-

peals of the District of Columbia in any of the following cases:

(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the commission.

(2) By any licensee whose license is revoked, modified, or suspended by the commission.

(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license.

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE ASSOCIATED BROADCASTERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia, entered on November 29, 1939, denying the Commission's motion to dismiss an appeal taken by respondent from an order of the Commission.

OPINION BELOW

The opinion of the court below (R. 28–30) is reported in 108 F. (2d) 737.

JURISDICTION

The decision of the court of appeals was entered on November 29, 1939 (R. 27). A motion for re-

argument filed by the Commission was denied on January 2, 1940 (R. 41). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 402 (b) of the Communications Act authorizes an appeal to the Court of Appeals for the District of Columbia from a decision of the Federal Communications Commission refusing its consent to a voluntary transfer of a radio station license, and, if so, whether Section 402 (b) authorizes an appeal by the proposed transferor.

STATUTE INVOLVED

The pertinent provisions of the Communications Act and of the Radio Act of 1927 are set out in the Appendix to the petition in *Federal Communications Commission* v. ~~*The Associated Broadcasters, Inc.*~~ Columbia Broadcasting Sys., No. —, filed herewith.

STATEMENT

The Associated Broadcasters, Inc. (hereafter called Associated), the respondent in this case, is a corporation licensed to operate Radio Station KSFO in the City of San Francisco (R. 6). Associated and Columbia Broadcasting System of California, Inc. (hereafter called Columbia),[1] requested

[1] Columbia was known as Western Broadcasting Company when these proceedings were commenced before the Commission (R. 7).

the Commission's consent to the assignment of Associated's radio station license to Columbia (R. 6). A hearing was held before an examiner, who recommended that the requested consent be refused (R. 6). Exceptions to the examiner's report were filed, and oral argument was had before the Broadcast Division, and, subsequently, before the Commission *en banc* (R. 6). On October 18, 1938, the Commission rendered its decision and order refusing its consent (R. 5–13).

Respondent and Columbia thereupon filed separate notices of appeal in the court below, alleging that the determination of the Commission was erroneous (R. 1–5). The Commission filed motions to dismiss the appeals on the ground that under Section 402 (b) of the Communications Act the court below was without jurisdiction to entertain an appeal from the Commission's denial of a request for consent to the assignment of a radio station license (R. 16, 17).

On November 29, 1939, the court below, Justice Stephens dissenting, rendered a decision denying the Commission's motion to dismiss in both cases (R. 28–30).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In holding that it has jurisdiction under Section 402 (b) of the Communications Act to review an order of the Commission denying an

application for consent to the assignment of a radio station license.

(2) In holding that it has jurisdiction under Section 402 (b) of the Communications Act to review, at the instance of the proposed assignor, an order of the Commission denying an application for consent to the assignment of a radio station license.

(3) In failing to dismiss the appeal.

REASONS FOR GRANTING THE WRIT

This case is the companion case of *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, No. —, the petition for certiorari in which is filed herewith. The respondent in this case is the proposed assignor of a radio station license and the respondent in the *Columbia* case is the proposed assignee. The court below disposed of the two cases in one opinion (R. 28).

The question which is presented in the *Columbia* case is also presented here, and the reasons for granting the writ which are advanced in the petition in that case are equally applicable here. Accordingly, the Court is respectfully referred to the petition in that case.

There is, however, an additional question presented here, that is whether, assuming that Section 402 (b) of the Communications Act authorizes an appeal to the court below from a decision of the

Communications Commission refusing its consent to a transfer of a radio station license, such an appeal can be prosecuted by the proposed transferor of the license.

The court below held that a request for consent to assignment of a license by the proposed assignee is the same as an application for a radio-station license and is governed by the same provisions of the statute. On this theory the effect of the contract to transfer a license is that the assignee agrees to apply to the Commission for a license to use the frequency now enjoyed by the assignor, while the latter agrees not to contest this application and undertakes to surrender its license if the Commission grants the application. Under this analysis, however, the transferor cannot possibly be aggrieved or adversely affected within the meaning of Section 402 (b) (2) by an order of the Commission denying the application any more than would any other person having a contract with the assignee conditioned upon favorable Commission action. The Commission does not owe a duty to third persons to grant an application for a radio-station license, nor does it owe a duty to a licensee to accept surrender of its license when no surrender has been tendered.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari to the United States Court of

Appeals for the District of Columbia should be granted.

FRANCIS BIDDLE,
Solicitor General.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.

APRIL 1940.

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Nos. 39, 40

In the Supreme Court of the United States

October Term, 1940

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., RESPONDENT

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

THE ASSOCIATED BROADCASTERS, INC., RESPONDENT

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 30–34) is reported in 108 F. (2d) 737.[1]

[1] The court below disposed of both cases in a single opinion. Since they involve the same facts and the same Commission order, this brief will cover both cases. Record references made herein are to the record in No. 39.

JURISDICTION

The decision of the Court of Appeals was rendered on November 29, 1939 (R. 30). A motion for reargument filed by the Commission on December 16, 1939 (R. 35) was denied on January 2, 1940 (R. 48). The petitions for writs of certiorari were filed on April 2, 1940, and were granted May 6, 1940. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED

Whether Section 402 (b) of the Communications Act of 1934 authorizes an appeal to the Court of Appeals for the District of Columbia from an order of the Federal Communications Commission refusing its consent to a transfer of a radio station license under Section 310 (b).

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475, and as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U.S.C., §§ 151 et seq.) and of the Radio Act of 1927 (Act of February 23, 1927, c. 169, 44 Stat. 1162, as amended by Act of July 1, 1930, c. 788, 46 Stat. 844) are set forth in the Appendix, *infra*, pp. 38–52.

STATEMENT

The Associated Broadcasters, Inc., respondent in No. 40 (hereinafter referred to as "Associated"), is a corporation licensed by the Commission to operate Radio Station KSFO in the City of San Francisco (R. 7). On August 8, 1936, Associated and Columbia Broadcasting System of California, Inc., respondent in No. 39 (hereinafter referred to as "Columbia"),[2] filed with the Commission a request for its consent in writing to the assignment of Associated's radio station license to Columbia under and pursuant to Section 310 (b) of the Communications Act (R. 7). In order to secure full information to determine whether the proposed assignment was in the public interest, the Commission, on December 2, 1936, held a public hearing before an examiner, who, on April 6, 1937, recommended that consent to the assignment be refused (R. 8). Exceptions to the examiner's report were filed, and oral argument was had before the Broadcast Division of the Commission, on July 1, 1937, and before the Commission *en banc* on January 14, 1938 (R. 8). On October 18, 1938, the Commission rendered its decision and order refusing consent to the assignment of Associated's license (R. 7–15).

Respondents thereupon filed separate appeals in the court below under Section 402 (b) of the

[2] Columbia was known as Western Broadcasting Company when these proceedings were initiated before the Commission (R. 7).

Communications Act (R. 1–6). The Commission moved to dismiss each appeal on the ground that the court below was without jurisdiction to entertain an appeal from an order of the Commission refusing its consent to the assignment of a radio station license (R. 17–21). The court below, with Justice Stephens dissenting, denied the Commission's motion to dismiss in both cases (R. 30–34).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In holding that it had jurisdiction under Section 402 (b) of the Communications Act to review a Commission order refusing its consent to the assignment of a radio station license under Section 310 (b).

(2) In failing to dismiss the appeal.

SUMMARY OF ARGUMENT

The court below, concededly, has no jurisdiction to entertain these appeals, unless Columbia, the proposed assignee of Associated's license, is an "applicant for a radio station license" within the meaning of Section 402 (b) (1) of the Communications Act.

I

By its plain meaning, the term "applicant for a radio station license" in Section 402 (b) (1) refers to a person who applies to the Commission

for the issuance of a license, not to one who seeks the Commission's consent to the assignment of an existing license which has already been issued to somebody else. The several sections of the statute governing the issuance of licenses by the Commission refer to "applicants" and "applications" for radio station "licenses." In contrast, Section 310 (b), relating to assignments, quite naturally makes no mention of "applicants" or "applications for licenses", since the Commission does not itself grant a license but simply approves an assignment of a license by its holder.

The differences between applications for licenses and assignments of licenses are so marked that it is unreasonable to assume that Congress intended to include within the phrase "applicant for a radio station license" a proposed assignee of a station license. These differences are: the necessity of filing formal applications under oath for licenses but not for assignments; the difference in the information which must be furnished in each class of case; the different considerations applicable to the granting or denying of licenses and to the granting or refusal of consent to assignments; the different procedures applicable in each case; and, finally, the different underlying purpose.

The sole reason advanced in the majority opinion of the court below as ground for construing

the words "applicant for a radio station license" so as to include a proposed assignee was that Columbia would otherwise be deprived of a right to judicial review. This conclusion completely ignores the express language of Section 402 (a); general jurisdiction is there conferred on three-judge district courts to review all orders of the Commission except those few expressly made reviewable by the court below. No reason is suggested why the order complained of is not reviewable in a three-judge district court or, if it is not there reviewable, why the defect in jurisdiction would not be equally applicable to the court below.

II

The legislative history of Section 402 (b) (1) amply supports the construction contended for by petitioner. Section 402 (b) is derived from, and is identical in all material respects with, Section 16 of the Radio Act of 1927, as amended. This earlier section, prior to its reenactment as Section 402 (b), received a binding judicial interpretation in *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, certiorari denied, 290 U. S. 680; its reenactment, without material change, gives rise to a presumption that Congress ratified the construction placed upon it in the *Pote* case. *Latimer* v. *United States,* 223 U. S. 501; *Hecht* v. *Malley,* 265 U. S. 144. The presumption is strengthened by the fact

that, at the time it reenacted the section, Congress was fully cognizant of the issues settled by the *Pote* case.

The report of the Senate Committee on the bill which became the Communications Act likewise supports our construction. It declared that the jurisdiction of the court below, with respect to orders denying applications for licenses, is limited to orders denying applications for *new* radio station licenses. A request for consent to the assignment of an existing license cannot possibly be considered an application for a *new* radio station license.

ARGUMENT

The Communications Act provides two mutually exclusive methods for obtaining judicial determination of the validity of orders of the Commission. General jurisdiction "to enforce, enjoin, set aside, annul, or suspend" orders of the Commission is vested by Section 402 (a) in three-judge district courts in accordance with the provisions of the Urgent Deficiencies Act. Expressly excepted from the jurisdiction of the three-judge district courts under Section 402 (a) are orders of the Commission "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending

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a radio operator's license"; review of such orders is placed by Section 402 (b) in the Court of Appeals for the District of Columbia.[3]

Orders granting or refusing consent to the assignment of a license under Section 310 (b)[4] are neither expressly excepted from the residual jurisdiction of the three-judge district courts under Section 402 (a) nor specifically included among those orders made reviewable in the Court of Ap-

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[3] Section 402 (b) reads as follows:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."

Section 402 (b) (3) is not involved in this case in any way since no question is present of a radio operator whose license has been suspended by the Commission.

[4] Section 310 (b) reads as follows:

"The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

peals for the District of Columbia by Section 402 (b). It necessarily follows that, unless the language of Section 402 (b) can be construed as comprehending such orders, despite the failure of Congress to list them, there is no basis for the assumption by the court below of jurisdiction of respondents' appeals.

Associated, the proposed transferor, cannot be considered an "applicant" for a construction permit, for a radio station license, or for a renewal or modification of an existing station license within the meaning of Section 402 (b) (1). Its request for Commission consent to an assignment of its license is an attempt to *divest* itself of a license and not to *secure* one. Respondents apparently concede this. They base their claim that Associated has the right to appeal under Section 402 (b) (2) upon the line of reasoning adopted by the court below; namely, that Columbia, the proposed transferee is, in reality, an "applicant for a radio station license," and consequently, that Associated is a "person aggrieved or whose interests are adversely affected" by the decision of the Commission denying an application for a radio station license. Associated's claim of a right to appeal to the court below, accordingly, is dependent upon the validity of Columbia's claim of a right to appeal under Section 402 (b) (1) and must necessarily fail if Columbia does not come within the provisions of that Section.

Columbia, the proposed transferee, contends that it comes within Section 402 (b) (1) on the ground that it is an "applicant for a radio station license." It does not contend that it falls within any other language contained in Section 402 (b), nor could any such contention be seriously urged.[5] The right of both Associated and Columbia to appeal to the court below thus depends upon the question whether Columbia, the proposed assignee of a radio station license, is an "applicant for a radio station license" within the meaning of Section 402 (b) (1). This is the sole question in the case.

I

THE WORDS "APPLICANT FOR A RADIO STATION LICENSE" DO NOT INCLUDE A PROPOSED TRANSFEREE OF A LICENSE

A. The Clear Meaning of the Words Excludes a Proposed Transferee of a License

1. The words "applicant for a radio station license" in Section 402 (b) (1) have a plain and natural meaning. They refer to a person who

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[5] Quite obviously a request by the proposed assignee for consent to an assignment of a license to it is not an application for a construction permit for a radio station. Such a permit is only required where construction is to be undertaken (Section 319 (a)). No construction is contemplated here. Nor is a request for consent to assignment of license an application for a renewal or modification of a license. Columbia has never received a license and it can hardly file an application to renew or modify something which it does not have.

seeks to obtain from the Commission (applicant) an instrument of authorization to operate a radio station (radio station license). The application is necessarily addressed to the Commission and, if the provisions of the statute are met, the Commission issues to the applicant a radio station license.

But one who files a request with the Commission for the consent required by Section 310 (b) does not seek any such instrument of authorization *from the Commission.* He simply asks the Commission for permission to do a particular act—i. e., obtain by assignment from the holder a license previously issued to him. When the Commission gives that permission, it does not issue any such license. If the assignment is consummated by the parties,[6] the license comes to the proposed transferee from the transferor and not from the Commission.

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[6] Whether the proposed transferee will get a license at all is contingent upon the future action of the transferor. An assignment of a license depends for its ultimate effectuation upon the action of the parties themselves. The Commission acts merely as the agency whose consent must be obtained to render the assignment legal. Thus, when the Commission gives its consent to an assignment of license it is merely removing the statutory disability against such assignment and is not issuing a license. The power actually to transfer the license itself rests only in the existing licensee, and the Commission, by consenting to an assignment, does not impose upon the existing licensee a duty to surrender the license to the assignee.

2. The contrast in terminology between the provisions of the Act dealing with applicants, or applications, for station licenses and the provisions concerned with assignments of licenses gives additional support to the conclusion that Section 402 (b) (1) does not grant a right of appeal to a proposed transferee of a license. Sections 307, 308, 309, and 319 govern the issuance of radio station licenses. Section 307 is a general direction to the Commission to issue *licenses* "to any *applicant* therefor" if it finds that the public interest, convenience, or necessity will be served by granting the license. Section 308 provides that the Commission may act "only upon written *application" for a license* and sets out the information to be furnished in the application. Section 309 directs the Commission to grant licenses "if upon examination of any *application for a station license"* the Commission finds that the grant would be in the public interest, convenience, or necessity. Section 319 makes provision for written *applications* for construction permits and directs the Commission to issue a *license* to the holder of a construction permit upon a showing of compliance with the conditions of Section 319 (b). No mention is made in any of these sections of transfers or assignments, nor is there any intimation in their context that they are intended to be applied to transfers or assignments. In contrast, the provisions of Section 310 (b) dealing with assign-

ments omit all reference whatever either to "applicants" or "applications for radio station licenses."[7] There is no warrant for assuming that the omission was inadvertent; Congress used the terms with precision and undoubtedly intended them to have the same meaning wherever used throughout the Act. It follows that the words "applicant for a radio station license" in Section 402 (b) (1) refer only to the persons described in Sections 307, 308, 309, and 319 who file an application for a radio station license, not to persons who seek consent to assignments under Section 310 (b) and who are nowhere referred to as applicants.

3. The provision in Section 310 (b) relating to transfers of control of corporate licensees likewise militates against a construction which would include a proposed transferee of a license within the words "applicant for a radio station license." Section 310 (b) prohibits, in the absence of written consent by the Commission, not only the transfer of the license itself but also the "transfer of control of any corporation holding such license." But, plainly, a person seeking control of a corporate licensee through purchases of its stock cannot

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[7] The only other provision of the Act relating to assignments of licenses, Section 309 (b) (2), likewise makes no reference to "applicants" or "applications for radio station licenses." It merely provides that "neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act."

be considered an applicant for a radio station license, since the license never changes hands. Nor could one seeking control of a corporate licensee through an assignment of the stock of its parent holding company be regarded as an applicant for the station license held by the subsidiary. It seems clear beyond dispute that the corporation remains the licensee whatever happens to its stock or to the stock of its parent holding company and, consequently, that one seeking the Commission's consent to a transfer of stock control of a corporate licensee cannot be considered an "applicant for a radio station license." Since Congress has, in the same section of the Act and in the same manner, prohibited the transfer both of licenses and of control of corporations holding such licenses and has given no indication whatever that it intended to differentiate between the two, it is only reasonable to assume that Congress did not intend either the transferee of the license or the transferee of stock control of the corporate licensee to be considered an "applicant for a radio station license."

B. The Differences Between An Applicant for a Station License and a Proposed Transferee of a License

A comparison of the provisions of the Act dealing with applications for station licenses and with assignments of station licenses discloses differences so marked that it is unreasonable to assume that Congress intended to include within the phrase

"applicant for a radio station license" a proposed assignee of a station license.

First, Section 308 requires that an application under oath must be filed in order to obtain a station license. No such requirement is contained in Section 310 (b) with respect to assignments of licenses. Indeed, under Section 310 (b), the Commission can give its consent to an assignment of license upon an oral request or even without any request for such consent, as, for example, where the Commission takes notice of a proposed transfer which it decides is in the public interest. Cf. *Anchorage Radio Club, Inc.*, F. C. C. Docket No. 4997, decided June 21, 1939.

Second, Section 308 (b) requires that certain specific information must be included in the written application for a station license. No such specific information is required under Section 310 (b) in support of requests for consent to assignments. In fact, a large part of the information which the Commission requires to be included in applications for construction permits and licenses would clearly be inapplicable and inappropriate in the case of requests for consent to assign licenses.[8]

Third, the considerations governing Commission

[8] The only information which the Commission requires in applications for a construction permit and station license which it also requires before consenting to the assignment of a license relates to the technical, financial, and other personal qualifications of the proposed licensee to maintain and operate the station. None of the other data which must be

action on applications for construction permits and station licenses differ from those governing its decision on requests for consent to the transfer of licenses. Such considerations as electrical interference with other stations, the necessity for a fair, efficient, and equitable distribution of radio service to different communities (Section 307 (b)), and, indeed, all the considerations bearing upon the question whether a new station should be allowed to utilize the radio spectrum, are without relevance to requests for consent to the transfer of licenses.

Fourth, different procedures regulate the handling of applications for station licenses and requests for consent to the transfer of licenses. Section 309 (a) of the Act,[9] which prescribes the

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supplied by applicants for a construction permit or a station license need be given by either the proposed assignor or assignee of a license. Such data are: (1) An exact description of the site of the transmitter; (2) the number of broadcasting stations and nonbroadcasting receiving stations within a designated radius of the transmitter site; (3) the name and location of all airports within 10 miles of the transmitter site and the distance of each airport from such site; (4) the names and distances of any established airways within 10 miles of the transmitter site; (5) maps showing among other things the character of the surrounding area of the station, the density and distribution of population, and the terrain and types of soil; (6) maps showing certain designated contours of operation of the station and the interference with the contours of other stations; (7) the area and number of persons within the said contours.

[9] Section 309 (a) reads as follows:

"If upon examination of any application for a station license or for the renewal or modification of a station license

procedure for dealing with applications for station licenses, contains two mandatory requirements: First, that if the Commission determines from an examination of an application that public interest, convenience, or necessity would be served by a grant thereof, it shall authorize the issuance of the license without a hearing; second, that if the Commission cannot make such determination, it shall afford the applicant notice and hearing.

There are no such mandatory requirements governing the procedure for handling transfers of licenses. Section 310 (b) merely provides that no license may be transferred unless the Commission, *"after securing full information"* decides that the transfer is in the public interest, and gives its written consent. Plainly, the manner of "securing full information" is left to the discretion of the Commission. Thus, depending upon what it considers "will best conduce to the proper dispatch of business" (see Section 4 (j)) in the particular case, the Commission is left free either to hold a hear-

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the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

ing, to obtain all the information it deems necessary by statements obtained from the transferor or transferee, or both, or to conduct an independent investigation with its own staff.

The construction adopted by the court below (R. 32) results in assimilating the procedure prescribed in Sections 307, 308, and 309 to Commission action in transfer cases despite the fact that such procedure is specifically limited to applications for station licenses only. This construction becomes the more untenable in the light of other sections of the Act. Section 325 (b) provides that no person shall be permitted to locate, use, or maintain in the United States a broadcast studio of a foreign radio station whose "emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor." Section 325 (c) provides that "such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of Section 309 hereof with respect to applications for station licenses or renewal or modification thereof." Clearly, therefore, when Congress intended to apply the procedure of Section 309 to Commission action in cases other than the granting or denying of licenses, it did so in express terms.

But the procedure of Section 309 was not made expressly applicable to the assignment cases under

Section 310 (b). On the contrary, Congress in such cases not only failed to apply such procedure in express terms but, in fact, provided for Commission action "after securing full information" in the manner deemed best suited to the end in view. The result reached by the court below, assimilating the procedure prescribed in Sections 307–309 to Commission action in transfer cases, renders meaningless the words "after securing full information" even though they were specifically added by Congress in 1934. *Market Co.* v. *Hoffman,* 101 U. S. 112, 115; *Ex parte Public National Bank,* 278 U. S. 101, 104; *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208.[10]

Fifth, the purpose of Sections 307, 308, 309, and 319 is to provide a procedure whereby the Commission can carry out the Congressional mandate contained in Section 303 (g) to "generally encourage the larger and more effective use of radio in the public interest." All that Section 310 was meant to do was to prevent the circumvention of the basic

[10] The distortion of the words "after securing full information" into a requirement that the procedure of other portions of the statute providing for hearings be followed, is all the more unjustified in the light of the fact that S. 2910, 73rd Congress, which was under consideration at the same time as the bill which became the Communications Act of 1934, expressly provided for a hearing on requests for consent to the transfer of licenses. A similar provision was contained in H. R. 7716, 72d Congress, a bill which passed both Houses of the previous Congress but which failed of enactment because of a pocket veto. See Sen. Rep. No. 1045, 72d Cong., 2d Sess., p. 5.

licensing provisions of the Act. It was not meant to provide a circuitous method of applying for a radio station license.

These differences between applications for a station license and requests for consent to the transfer of a license are fundamental. They cannot be minimized simply by stating, as the court below did, that "the one application comes just as clearly within the contemplation of Section 402 (b) as the other" (R. 32).

C. The Construction Adopted by the Court Below Was Not Necessary to Produce a "Sensible Result"

The chief basis for the result reached by the court below—that Columbia is an "applicant for a radio station license"—was that it would not be a "sensible result" to hold that Columbia, by following the procedure prescribed in Section 310 (b) governing a request for consent to the assignment of a license rather than the procedure governing an application for a station license to operate the facilities enjoyed by Station KSFO, "has deprived itself of a right of judicial review" (R. 31). There are two patent fallacies in this reasoning.

In the first place, the court below assumed, without examining the provisions of the Act, that a proposed assignee of a station license would have no right to judicial review unless such assignee were considered an "applicant for a radio station license." This assumption flies in the teeth of Section 402 (a); three-judge district courts are

there given general jurisdiction to review all orders of the Commission, save only those few expressly excepted from Section 402 (a) and covered by Section 402 (b). Any order not reviewable under Section 402 (b) must be reviewable, if at all, under Section 402 (a). Any principle of law which might prevent a three-judge district court from reviewing an order under Section 402 (a)—none was suggested by the court below—would equally prevent the court below from assuming jurisdiction over such an order under Section 402 (b).[11] If the court below did not simply ignore Section 402 (a), it must have believed that subdivision (a) did not cover the order before it. In effect, then, the court reached its conclusion that it could review the order under the limited jurisdiction given by Section 402 (b) because the order was not included in the general jurisdiction con-

[11] There are, of course, a variety of reasons why a particular court may not have jurisdiction of a particular proceeding. The lack of jurisdiction may derive from some limitation in the statute relied on as conferring jurisdiction on the court, or from failure to make proper service, absence of indispensable parties, or lack of standing to sue sufficient to constitute a case or controversy. It is the first of these possible jurisdictional defects which is at issue in this proceeding. All of the other possible reasons why a court might not have jurisdiction to review the Commission's refusal to consent to a transfer of license would apply with equal force to the three-judge district courts and the Court of Appeals. A want of jurisdiction in the district courts for any such reason could not, therefore, be a ground for deciding that the Court of Appeals had jurisdiction of respondents' appeals.

ferred by Section 402 (a). The syllogism has an extraordinary middle premise: the proposition that the less includes all that is not found in the greater. Jurisdiction may sometimes rest upon logical inference, but the inference should at least be tenable.

In addition, the reference of the court below to a "sensible result" assumes the very question at issue; it assumes that a request for consent to the transfer of a license is no different from an application for a station license. That such an assumption—made without any discussion in the court's opinion—is contrary to fact has already been demonstrated. See pp. 14–20, *supra*.

The result reached by the court below is thus supported only by reasons which are clearly erroneous on their face.

II

THE LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS DID NOT INTEND THE COURT BELOW TO REVIEW ORDERS OF THE COMMISSION REFUSING ITS CONSENT TO AN ASSIGNMENT

The validity of the Commission's contention that the words "applicant for a radio station license" in Section 402 (b) (1) do not include a proposed transferee of a station license can scarcely be doubted. But, if there were any doubt, the legislative history would completely dispel it. That history shows, in short, that Congress, during its consideration of the Communications Act of 1934, had before it a binding judicial construction of a section of an earlier

statute and ratified that construction by re-enacting the earlier section, in almost identical terms, as Section 402 (b). This construction is reinforced by the report of the Senate Committee in charge of the bill.

A. The Pote Case

Section 16 of the Radio Act of 1927,[12] the predecessor of Section 402 (b), provided, *inter alia*, for appeals to the Court of Appeals for the District of Columbia by "*any applicant* for a construction permit, *for a station license,* or for the renewal or modification of an existing station license whose application is refused." [Italics supplied.]

In 1930, Congress amended Section 16 to read, in part, as follows:[13]

> (a) An appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Appeals of the District of Columbia in any of the following cases:
>
> (1) By any *applicant for a station license,* or for renewal of an existing station license, or for modification of an existing station

[12] 44 Stat. 1169. The Report of the Senate Committee on S. 3285, which became the Communications Act of 1934, states that the provisions of Section 402 (b) follow Section 16 of the Radio Act of 1927. Sen. Rep. No. 781, 73d Cong., 2d Sess., p. 9. See also Hearings on S. 2910, 73d Cong., 2d Sess., pp. 44–45 (Statement by E. O. Sykes, Chairman, Federal Radio Commission).

[13] 46 Stat. 844.

license whose application is refused by the commission.

(2) By any licensee whose license is revoked, modified, or suspended by the commission. [Italics supplied.]

This was the appeals section in controversy in the case of *Pote* v. *Federal Radio Commission,* 67 F. (2d) 509, certiorari denied, 290 U. S. 680; the decision there turned upon the answer to the very question now before this Court, namely, whether the words "applicant for a station license" include a proposed transferee of an existing license. Pote, the proposed assignee, filed with the Commission, pursuant to Section 12 of the Radio Act of 1927, a request for consent to the assignment of the license of Station WLOE. The Commission entered an order refusing its consent, and Pote filed an appeal with the Court of Appeals of the Disthict of Columbia under Section 16, as amended. The Commission, as in the case at hand, thereupon moved to dismiss the appeal on the ground that "a right of appeal in such case is not granted by Section 16 of the Radio Act of 1927, as amended." The court, with Groner, J., dissenting,[14] agreed with the Commission, and dismissed the appeal. This Court denied the petition for certiorari. 290 U. S. 680.

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[14] The reasoning in Justice Groner's dissent in the *Pote* case is the same as that expressed on behalf of him and Justice Miller in the majority opinion in the case at bar:

"Appellant * * * is, in contemplation of section 16 of the Radio Act * * * as amended * * * an 'ap-

The *Pote* case was decided June 19, 1933. Within a year Congress repealed the Radio Act of 1927 and enacted the Communications Act of 1934 in its stead. By the new Act, Congress curtailed the jurisdiction of the Court of Appeals for the District of Columbia to review orders of the Commission by eliminating appeals from orders revoking, modifying, or suspending licenses. The provisions of Section 402 (b) (1), however, upon which the jurisdiction of the court below here depends, were carried over without any material change [15] from Section 16 (a) (1) of the Radio Act of 1927, as amended. This section now reads:

> (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:
>
> (1) By *any applicant* for a construction permit fo ra radio station, or *for a radio station license,* or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. [Italics supplied.]

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plicant for a station license.' The fact that he is applying for a transfer to him of a previously existing license does not make him any the less an 'applicant' for a license."

[15] Two changes were made. The word "radio" was added to modify "station licenses", apparently for technical reasons of draftsmanship. An express provision for appeals from orders of the Commission denying applications for construc-

This re-enactment by Congress of Section 16 (a) (1) of the Radio Act of 1927, as amended, after the decision in the *Pote* case construing that section, gives rise to a presumption that Congress, by such re-enactment, approved and adopted the construction advanced by the decision. *Latimer* v. *United States*, 223 U. S. 501, 504; *Hecht* v. *Malley*, 265 U. S. 144, 153.

The presumption of Congressional ratification of the *Pote* case is strengthened by various factors.

First, the conclusion is irresistible that Congress was fully aware of the constructional problems raised by Section 16 of the Radio Act of 1927, as amended, and the court decisions settling them, when it re-enacted Section 16 (a) as Section 402 (b) of the Communications Act of 1934. While the *Pote* case was pending in the Court of Appeals, but before it was decided, Congress was in the process of considering H. R. 7716 (72d Congress) which amended twelve sections of the Radio Act of 1927. The bill, as reported by the Senate

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tion permits was also added. The right of appeal from a denial of an application for a construction permit was part of the original Section 16 of the Radio Act of 1927, but was omitted by inadvertence when the 1930 amendment was adopted. *Goss* v. *Federal Radio Commission*, 67 F. (2d) 507. See also Remarks of Mr. Lehlbach on 71st Cong., H. R. 11635, 72 Cong. Rec. 8054–8055; Hearings before Senate Committee on Interstate Commerce on 72d Cong., H. R. 7716 (December 22 and 23, 1932), pp. 31–32; Remarks of Senator White on same, 76 Cong. Rec. 5208.

Committee on Interstate Commerce, amended Section 16 (a) to read as follows:[16]

> An appeal may be taken to the Court of Appeals of the District of Columbia from any order of the Commission granting or denying, in whole or in part, an application for a station license, or renewal of station license, or for modification of a station license, *or for approval of transfer or acquisition under this Act,* and from any order of the Commission revoking, suspending, or modifying, or refusing to revoke, suspend, or modify a construction permit or station license. [Italics supplied.]

The bill was recommitted to the Committee on Interstate Commerce; it reported back Section 16 (a) *without* the provision authorizing an appeal from an order granting or refusing approval in transfer or acquisition cases.[17] The deletion of this provision, at a time when the *Pote* case—turning upon the very issue covered by the provision—was still pending, is persuasive evidence of Congressional cognizance of the problem raised in that case. The bill, with the provision omitted, was passed by both Houses of Congress but failed of enactment because of a pocket veto.[18]

Second, in adopting Section 402 (b) (1) of the

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[16] H. R. 7716, as reported, April 14, 1932, p. 15; see Sen. Rep. No. 564, 72d Cong., 1st Sess.

[17] H. R. 7716, as reported, January 11, 1933; see Sen. Rep. No. 1045, 72d Cong., 2d Sess., pp. 5–6.

[18] 76 Cong. Rec. 5397.

Communications Act of 1934, Congress changed Section 16 (a) (1) of the Radio Act to authorize in express terms appeals from orders denying applications for construction permits; yet, at the same time, it failed to authorize appeals from action of the Commission refusing consent to assignments. This difference in treatment is significant. On the day that it handed down the decision in the *Pote* case, the Court of Appeals for the District of Columbia decided the case of *Goss* v. *Federal Radio Commission*, 67 F. (2d) 507, likewise turning upon the construction to be given Section 16 of the Radio Act of 1927, as amended. The question for decision in the *Goss* case was whether an appeal to the court below could be taken to review an order of the Commission denying an application for a construction permit. The court held that it could, despite the absence of any express statutory authorization; it reasoned that an application for a construction permit is in substance an application for a radio station license. This decision was brought directly to the attention of Congress in the hearings preceding the enactment of the Communications Act of 1934,[19] and in order to avoid any possible doubt on this score, Congress made express provision in Section 402 (b) (1) for an appeal from a denial of a construction permit.[20]

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[19] See Hearings on 73d Cong. S. 2910, pp. 44–45.

[20] Such a provision had been omitted by inadvertence when the 1930 amendment was adopted. See note 15, *supra*. See also Hearings on 73d Cong., S. 2910, pp. 44–45.

This abundance of caution on the part of Congress evidences a thorough and painstaking consideration of the problems and decisions arising under the appeals provisions of the Act; the failure to alter other provisions, notably the one affecting the issue in the *Pote* case, is a clear indication that Congress was satisfied with the construction adopted and settled by that decision.[21]

Finally, it may be observed, when the Communications Act of 1934 was under consideration, Congress had available, in addition to other materials, the current annual report of the Federal Radio Commission containing a summary and discussion of both the majority and minority opinions in the *Pote* case.[22] Congress, notwithstanding the minority opinion in the *Pote* case, still reenacted the very language of Section 16 (a) (1).

The minority opinion in the *Pote* case, however, was substantially adopted by the majority in the case at hand. The majority here argued that a

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[21] There was no occasion for Congress to alter Section 16 (a) (1), after the decision in the *Pote* case, so as expressly to *exclude* appeals from orders refusing consent to assignments, since there was nothing in its terminology to indicate that any other construction was possible. See pp. 10–22, *supra*. The *Goss* case, on the other hand, read an additional grant of jurisdiction into terminology which, if literally interpreted, indicated an opposite result; accordingly, Congressional approval of the latter case was evidenced by granting the additional jurisdiction in express terms.

[22] 7th Annual Report, Federal Radio Commission, p. 13 (Transmitted January 3, 1934).

presumption that Congress had taken a view opposed to that of the minority in the *Pote* case could not properly be indulged and that the differences in terminology between Section 12 of the Radio Act of 1927 and Section 310 (b) of the present Act were sufficient justification for the reversal of the decision which had stood for six years. Neither branch of its argument has a solid foundation.

As ground for refusing to indulge a presumption that Congress approved the interpretation adopted in the *Pote* case, the court below relied upon the observation in *United States* v. *Raynor*, 302 U. S. 540, 551–552, that "one decision construing an act does not approach the dignity of a well-settled interpretation." The application of such a principle is appropriate, without doubt, in the situation where the circuit court of appeals is only one out of ten before which the identical question may arise. That was the situation before the Court in the *Raynor* case. An altogether different situation is presented here. As Justice Stephens observed, in his dissenting opinion, the question of construction raised in the *Pote* case was answered by the only court before whom it could arise;[22] since certi-

[22] The question could arise in a three-judge district court only if the plaintiff there chose to attack the jurisdiction it was invoking, or the Commission chose to reverse its position before the Court of Appeals, or the three-judge court chose to challenge its jurisdiction conceded by both parties. None was a likely occurrence.

orari was denied by this Court, the *Pote* decision was, in fact, "a conclusive construction of the 1930 act" (R. 33–34). Compare *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 293 U. S. 528, 294 U. S. 464; Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, p. 666, n. 71.

The differences between Section 310 (b) of the Communications Act of 1934 and Section 12 of the Radio Act of 1927 offer equally inadequate support for the refusal to follow the construction adopted in the *Pote* case. The presumption that Congress approved that construction arises because of the re-enactment, without material change, of Section 16 of the Radio Act, the appeals section. Sections 12 and 310 (b), on the other hand, provide restrictions on the alienation of licenses; the only change in Section 12 that could possibly be relevant to the construction to be given the appeals section would be a change affecting the character of a request for consent to the assignment of a license, so as to make it an "application for a radio station license." No such change was made or suggested. Section 310 (b), quoted below, merely added to Section 12 the italicized words, as indicated:

> (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily

> disposed of, *or indirectly by transfer of control of any corporation holding such license,* to any person, unless the Commission shall, *after securing full information, decide that said transfer is in the public interest,* and shall give its consent in writing.

The restrictions provided for by these additional words are threefold: (1) The Commission must consider the public interest in passing upon transfers; (2) the prohibition against alienation of licenses is broadened so as to cover transfers of control of a corporation holding a license; (3) the Commission must secure full information before giving its consent to an assignment of license.

These changes quite evidently do not alter the character of a request for consent to an assignment of a license and do not suggest that such a request becomes an "application for a radio station license." Indeed, the latter two changes are, as we have shown, strong evidence of the contrary (see *supra,* pp. 13–14; 16–19).

We submit, therefore, that the construction adopted by the decision in the *Pote* case received Congressional approval by reason of the subsequent reenactment of the statute with full knowledge of the issues settled by that decision.

B. Senate Report 781 on S. 3285

Further evidence, if any be needed, of the intent of Congress to deny a right of appeal to the court below from Commission action refusing consent

to the transfer of a license, is furnished by the history of S. 3285,[24] which became the Communications Act of 1934. S. 3285 was introduced by Senator Dill, Chairman of the Interstate Commerce Committee. As introduced in the Senate and reported by the Committee, Sections 402 (a) and (b) were in the form finally enacted into law. The scope of this section was explained in the following terms, in the Committee's Report:[25]

> Under section 402 (a), the court review now applicable to orders of the Interstate Commerce Commission will apply to suits to enforce, enjoin, set aside, annul, or suspend orders of the Communications Commission, with certain exceptions, so that the special three-judge courts can review them and the appellant can then take his appeal direct to the Supreme Court of the United States.
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> * * * * *
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> Subsection (a) excludes certain orders of the Commission with respect to radio-station licenses from this method of appeal. It provides that orders relating to the grant-

[24] 73rd Congress, S. 3285.

[25] Sen. Rep. No. 781, 73d Cong., 2d Sess., p. 9. The House Committee on Interstate and Foreign Commerce (H. Rep. No. 1850, 73d Cong., 2d Sess., p. 2) recommended that the provisions of the Radio Act of 1927, as amended, be not changed except to create a new commission. The bill, as passed, adopted the Senate version of Section 402. See Conference Report, H. Rep. No. 1918, 73d Cong., 2d Sess., pp. 49–50.

ing or refusal of an application for a *new* radio-station license or for the renewal or modification of a license shall be appealed only to the Court of Appeals of the District of Columbia. The bill then sets out the method of appeal by following section 16 of the Radio Act of 1927, providing for appeals of radio cases in the courts of the District of Columbia.

Stated briefly, the court appeal provisions of this bill transfer the provisions of the present law with respect to injunctive relief and appeal as now found in the Interstate Commerce Act and the Radio Act to this Act, *with the exception of the three kinds of* radio cases referred to above. [Italics supplied.]

This explanation clearly establishes the construction for which we contend. It discloses an intention to restrict the jurisdiction of the court below to three kinds of cases, i. e., orders granting or refusing applications (1) for a *new* radio station license, (2) for a renewal of license, or (3) for a modification of a license.[26] None can be viewed as comprehending a request for consent to the assignment of a license. An assignment, by its very nature, presupposes a license already in existence;

[26] The report went on to explain that the reason for prescribing two different methods of appeal was to remove the hardship to distant radio stations which were required to prosecute their appeals in Washington. Under the new statute, the report pointed out, a licensee can file his appeal in a three-judge district court in the district where he lives when the order affecting his interests was not originated by

therefore, a request for consent to assign such a license cannot possibly be an application for a *new* license.

The purpose of Congress, as reflected by the report of the Senate Committee on Interstate Commerce, to confer jurisdiction on the court below over appeals from orders denying applications for *new*, but not from action of the Commission refusing consent to assignments of *existing* radio station licenses, was fully carried out. Section 402

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him. Where he applies to the Commission for an order, however, then he must come to Washington to prosecute his appeal, just as he came to Washington to ask for the order. The report continues (page 10):

"Your committee believes that this appeal section is eminently fair. In *nearly all* cases in which the Commission makes an order affecting a licensee which the licensee did not seek, the Commission must go to the district court having jurisdiction of such licensee. Where an applicant or a licensee comes to the District of Columbia and applies for an order, he must take his appeal in the courts of the District of Columbia." [Italics supplied.]

The Conference Report (H. Report 1918) contains a similar explanation. The House amended S. 3285 by carrying over section 16 of the Radio Act of 1927, as amended, but the conference accepted the Senate version of Section 402. The explanation given by the conference report is as follows (pp. 49–50):

"The Senate bill (sec. 402), for the purposes of cases involving carriers, carries forward the existing method of review of orders of the Interstate Commerce Commission, and, *in the main*, for 'radio' cases carries forward the existing method of review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in

(b) (1) refers to an "applicant for a radio station license" but, where modifications or renewals of licenses are concerned, refers to "an *existing* radio station license." This is a clear recognition of the fact that existing licenses can be modified or renewed but cannot be acquired by application to the Commission. Only new licenses can be so acquired. Existing licenses can be acquired only by assignment from a licensee.

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the case of orders of the Interstate Commerce Commission." [Italics supplied.]

It is clear that these explanations are intended to expound the general scheme of the Act with respect to the methods of review and are not designed to explain the specific applications of each provision.

That this general explanation was not intended to be all-inclusive is evident from the fact that a denial of an application for a radio operator's license required by Section 318 can be reviewed only in a three-judge court though it arises from action initiated by the complaining party. Similarly, in the case of Commission action denying an application for the permission required by Section 325 to locate a studio of a foreign broadcast station in the United States when the emissions of such foreign station are capable of being received consistently in the United States, the mode of review departs from the general scheme. Such an application is obviously not an application for a station license within the meaning of Section 402 (b) (1), nor is it within any of the other provisions of Section 402 (b) delimiting the jurisdiction of the court below. Therefore, despite the fact that Commission action denying such an application arises from an application filed by a complaining party, it is reviewable, if at all, in a three-judge district court. The assignment of a license is merely another exception to the general scheme—one clearly within the contemplation of Congress as is evident from the report of the Senate Committee on Interstate Commerce.

This distinction is entirely overlooked in the majority opinion in the court below. Its underlying theory is that, since the end result is the procurement of a license, a request for consent to an assignment is an application for a license even though the license sought is already in existence. Such a theory ignores entirely both the significance of the word "existing" in Section 402 (b) (1) and the Congressional declaration that appeals to the court below lie from orders denying applications for *new*, not from action of the Commission refusing consent to assign *existing*, radio station licenses.

CONCLUSION

Both because of the language of the statute and its legislative history, the judgment of the court below should be reversed.

Respectfully submitted.

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SEPTEMBER 1940.

APPENDIX

The relevant provisions of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475; and as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189 (47 U. S. C. Secs. 151 *et seq.*)) are as follows:

> SEC. 4. (j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.
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> SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
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> (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is de-

mand for the same the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modifica-

tions of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921.

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SEC. 310. (a) The station license required hereby shall not be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any foreign government or the representative thereof;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

* * * * *

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * *

SEC. 325. (a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station

rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

(b) No person shall be permitted to locate, use, or maintain a radio-broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

(c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest.

* * * * *

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting

or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days

from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall, within thirty days thereafter, file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have

power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

The relevant sections of the Radio Act of 1927 (Act of February 23, 1927, c. 169, 44 Stat. 1162, as amended by Act of July 1, 1930, c. 788, 46 Stat. 844) are as follows:

SEC. 12. The station license required hereby shall not be granted to, or after the granting thereof such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or associa-

tion organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.

* * * * *

SEC. 16. (a) An appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the commission.

(2) By any licensee whose license is revoked, modified, or suspended by the commission.

(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license.

Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the commission. Unless a later date is specified by the commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the commission in the city of Washington.

(b) The commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person, firm, or corporation shown by the records of the commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person, firm, or corporation to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the commission in the city of Washington. Within thirty days after the filing of said appeal the commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application involved or upon its order revoking, modifying, or suspending a license, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons, firms, or corporations to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(c) Within thirty days after the filing of said appeal any interested person, firm, or corporation may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the commission. Any person, firm, or corporation who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the commission complained of shall be considered an interested party.

(d) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review of the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.

(e) The court may, in its discretion, enter judgment for costs in favor of or against an

appellant, and/or other interested parties intervening in said appeal, but not against the commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof: *Provided, however,* That this section shall not relate to or affect appeals which were filed in said Court of Appeals prior to the enactment of this amendment.

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